1952 K File No. O.Cr.P.C./52

Legal Dept. Pt- II

A BRANCH

Subject:— Opinions under the

Code of Criminal Procedure

1898

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File No. Cr.P.C./52

Gen. 194 a.

Pt- II.

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C O N T E N T S .

Legal Department File No. O. Cr. / P.C/52 pt.II.

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10) 13705 21-8-52 Whether sanction of Govt. under Sec . 197 Cr. P.C. for the prosecution of the Police Inspector is necessary and whether commr. of Police is capetent to dismiss Police Inspector. 35-36.

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Office of the R.L.A.

The 10 different transactions in respect of which R.L.A.'s opinion is invited are briefly as under :-

Article	Date of alleged transaction or purchase.	Alleged contractor.	Amount paid Rs.	Date of bearer cheque.	Date of cashing the cheque.
I Roller skins, manure, fuel, etc.	12-4-47	Anil Kumar in the name of Ali Mohamed & Co.	27,299-3-6	12-4-47	18-4-47.
Cotton waste.	12-4-47	Narandas / Damodar-Das.	9,375-0-0	18-4-47	18-4-47.
III Caustic soda (II casks)	30-5-46	Prabhudas Jivanlal	3,541-1-0	17-4-47	18-4-47.
IV Kadia Gundh (30 bags)	29-6-46	Mohanlal & Co.	5,078-12-0	28-3-47.	not known.
V Electric wires.	28-1-47.	Shri Krishna Electric Co. of Lohar Chawl, Bombay.	5, 750-0-0	18-4-47	18-4-47.
VI Card tops.	31-8-46	M. Chahi-wala & Co.	6,250-0-0	17-4-47	18-4-47.
VII Dyes.	Not known.	Textile Dye Traders.	6,712-8-0	18-4-47	18-4-47
VIII 800 spindles,	31-10-46	M/s. Textile Service.	7,920-0-0	15-4-47	18-4-47
IX 700 spindles.	31-12-46	-do-	6,715-10-0	16-4-47	18-4-47.
X Repairs.	Not clear from record.	A.K. Chunav wala.	11,720-0-0	17-4-47	18-4-47

Out of these items, there are already pending prosecutions in respect of items I & VI. The prosecution in respect of item I is at the instance of a private party namely, Shri S.K.Dyer. The prosecution

in respect of item VI ds at the instance of the State. These prosecutions are for ciminal breach of trust in rewpect of these anounts. As prosecutions are pending, it is not necessary to express any opinion in respect of these two items. It may be be pointed out, however, that the prosecution in respect of item I was instituted by Shri Dyer because the State failed to take any action at his instance for a condiderable time inrespect of that mater. The Public Prosecutor, Ahmedabad, states that there is not sufficient prima ficie evidence to justify a prosecution in respect of item I. That opinion does not appear to be correct. Having regard to the alterations made in the account books inrespect of the entries of this item, the relationships between the Director Shri R.R. Morarka and the contractor Anilkumar who it appears was no other than a servant of his, the fact that there was no necessity for all the goods of this type or of this quantity, the fact that these goods were not supplied and no attempt to supply them was made till about a year after the payment and that the attempt was made after investigation in the case had been taken up by the Police, and the fact that the alleged contractor never dealt in such goods or in such name, there is prima facie case for a prosecution of Shri R.R.Morarka and shri Anilkumar for an offence of criminal breach of thust

and abetment respectively. The evidence is not sufficient to impli cate Shri Sundaram, the Private Secretary of Morarka who is stated to have cashed the cheque.

Out of the remaining eight items, the evidence relating toitems II , III,IV,V, VIII,IX and X, though raises considerable suspicion against Shri Morarka, is not sufficiently strong for a su ccessful prosecution .In respect of item II, the party who is alleged to have suppled the goods has been traced and accepts the position that he was to supply the goods, has been traced and accepts the position that he was to supply the goods.The goods which are to be supplied have been pointed out as already stored at Bombay. In respect of items III and IV, although the contractors cannot be traced, and there is some suspi - cion about the entry in the gate book relating to thereceipt of the goods, it will be difficult to show that the goods were not supplied on the dates mentioned in the gate book and the store book. As regards item V, although Shri Krishna Electirc Co. of Lohar Chawl, Bombay, disowns this transaction ~~xxxx

In respect of item X, although the repairer is not traced and there is no correspondence or agreement with the said repairer in respect of the repairs in spite of the amount being large, the fact remains that repairs were done to the mills. It may be that the bill was inflated but it would be difficult t o establish the fact or to show that the difference between the real amounts spent and the amount paid was missappropriated by Shri Morarka.

There appears to be a good case for prosecution in respect of item VII. Apart from the fact that the alleged supplier is not traced, there are the furhher facts that there is no correspondence with the said supplier in respect of the said transaction., no agreement or contract, and no entry of receipt either in the gate book or in the store book. These facts when considered in the light of the circumstances that the the bearer cheque was issued and cashed on the same date, and that the cheque has disppeared would make out a prima ficia case for criminal breach of trust against Shri R.R.Morarka. It is true that at the time when this cheque was cahsed, Shri Anilkumar and Shri Sundaram were at Ahmedabad along with Shri R.R.Morarka. But there is no evidence of thier having conspired with or abetted Shri R.R.Morarka in the misappropriation of this amount.The allegations that the cheque was in f act cahhed by Sundaram cannot be proved as the cheque is missing.

Id/- P.M.L..
dt/- 2/8/

Remembreancer of Legal Affairs.

U.R. to H.D. No. 768-Confl. dated the 4th August 1952.

V.V.K. 29/6/56/ 5C.

Office of the R.L.A.

Prosecution of Shri Bhagwandas.

Criminal Procedure Code, Sec. 189.

Under section 189 of the Criminal Procedure Code, "the State Government may, if it thinks fit, direct that copies of depositions made or exhibits produced before ..... a Judicial officer in or for the territory in which such offence is alleged to have been committed shall be received as evidence by the Court holding such inquiry or trial in any case in hich such Court might issue a commission for taking evidence as to the matters to which such depositions or exhibits relate. "

2. Now the two cheques which have been sent would come within this provision being exhibits before the Goa court. But by themselves they would not be much value in the proceedings against Bhagwandas Chellaram for offences under sections 467, 471, 420, 511, and 109 of the Indian Penal Code. It will have to be proved firstly that these cheques were forged and that the accused Bhagwandas Chellaram had a hand in forging them or using them as forged documents. For this the statements of witnesses with whom or through whom those cheques were sought to be cashed or negotiated by the said Bhagwandas along with Marvin Mansion would be relevant. Those witnesses are not available. Their statements recorded before the Police have been sent by the authorities in Goa. Now these statements cannot be said to be copies of depositions before a judicial officer and, even assuming that these statements were produced before the Goa Court, it would be straining the language of section 189 too much to say that these statements were exhibits produced before a judicial officer. Therefore, it would not be possible to issue a direction under section 189 in respect of these statements.

V.v.k. 28/6/

3. Furthermore even if the statements could be construed as exhibits produced before a judicial officer, they would not be sufficient to secure a conviction of Bhagwandas Chellaram. The statements are of three persons namely , Jagoomal Kamal, Figueiredo and Antonio. Of these the statements of Jagoomal and Figueiredo are not of much use so far as accused Bhagwandas is concerned . It is their case that Marvin Mansion approached them with the cheques and Bhagwandas merely accompanied him. The statement of Antonio no doubt shows that it was Bhagwandas who approached him but unfortunately, as he was not acquainted with the accused, he has referred to him as "the other Indian " throughout his statement. Therefore, with respect to that statement, there would be difficulty of identification. Moreover, as the Goa proceedings have notended in a conviction, very little evidentiary value will be attached to these statements which , as earlier pointed out, were recorded before the police and not before a judicial court in Goa.

4. The RL.A. would suggest that we may adopt one of the two following courses :- (1) The Bombay Court can write to the Goa City Court to record the statements of the above witnesses, and we might depute a Police Prosecutor to help in the recording of such statements or (2) The witnesses though they cannot be officially compelled may be unofficially persuaded to come to Bombay for being examined by Court. If neither course is possible no useful purpose will be served by launching a prosecution and issuing a direction under section 189 in respect of the documents and statements received.

Id/- P.M.L.
dt/- 27/5/
Remembrancer of Legal Affairs.

28/6/56 R. to P. & S.D. No. 487-Confl. dated the 28th May 1956

5C.

Office of the R.A.A.

The notice issued by the Magistrate required the P.S.I. to appear before him on the 1st April 1952 and presumably, the P.S.I. must have complied with the notice. The papers, however, do not show whether the Magistrate has taken any action. If he had already discharged the notice, it would not be necessary to decide any point arising out of this case as any such discussion would be academic. As regards the point raised in Secretary, H.D.'s note, it may be observed that though Government Ciruclar, H.D. No. 207/5, dated the 1st July 1946, requires that the Anti-corruption branch should do only the preliminary inquiry, it does not dispense with the provisions of the Criminal Procedure Code, and it would be obligatory on the Police to send a report under section 157, Criminal Procedure Code to the Magistrate empowered to take cognizance before entering upon the investigation.

Sd/- P.M.L.
dt/- 2/7/
Remembrancer of Legal Affairs.

U.R. to H. D. No. 11040,
dated the 3rd July 1952.

29/6/56/ V.V.K.

5C.

Office of the R.L.A.

The letter from the Chief Secretary to Government, Punjab, does not bring out clearly why the appointment of Shri S.Kulwant Singh as a special Magistrate in Bombay State is considered necessary in this case. The appointment is not to be made merely for the purpose of facilitating examination of witnesses as presumed by H.D. but it appears to be asked for, as would be seen from the enclosed letter of the Superintendent of Police, Ambala, with a view to empower him to try certain offences alleged to have been committed by the accused in the Bombay State-. From the report of the Superintendent of Police, the accused appears to have cheated the Government of Punjab by preparing false T.A.bills though the journey was performed in Government conveyances. Under section 177 of the Criminal Procedure Code every offence shall ordinarily be enquired into and tried by a Court within the local limits of whose jurisdiction it is committed and the Superintendent of Police appears to have made the request in question having regard to these provisions. However, having regard to the nature of the offence committed, namely, cheating the Government of the Punjab, section 179 of the Criminal Procedure Code will be attracted in this case. Under that section

were a person is accused of the commission of any offence by reason of anything which has been done and of any consequence which has ensued. such offence may be inquired into or tried by court within the local limits of whose jurisdiction any such thing has been done or any such consequence has ensued. Here the consequence has ensued in the Punjab for it would appear that the money was parted with by the Government in the Punjab and the false accounts were rendered by the accused in the Punjab. If so, the special migistrate appointed by the Govern ent of Punjab would have jurisdiction and need not be invested with powers by the Govt. of Bombay Under section 14. Moreover, if the view be taken that the offence is triable only in the State of Bombay, it is edtreemly doubtful whether under section 14 of the Criminal Producedure Code , the Government of Bombay can make an order the effect of which will be to authorise a magistrate sitting out side the State of Bombay to try a case triable in the State of Bombay .

Id/- P.ML.
dt/- 1/8/

Remembrancer of Legal Affairs

U.R. to H.D. No. 12835 ,

dated the 2nd August 1952.

V.VK. 29/6/56/

5C.

Office of the R.L.A.

Order under section 144, Criminal Procedure Code,

With a view to preserve law and order during the elections of the Saudiatti Yellamma Municipality, the District Magistrate, Belgaum in exercise of powers conferred by section 144 of the Criminal Procedure Code issued an order on 18th May 1952 directing inter alia that :

(1) No person shall convene, hold or attend any public meeting within the said Municipal limits on 5th June 1952.

(2) No person shall arrange, lead or attend any public procession within the said Municipal limits on 5th June 1952, and

(3) No person shall, on 5th June 1952 .....commit any of the following acts within 100 yards of the polling Stations in the polling stations or in any public or private place within of the Municipal election, viz. (e) exhibit any notice or sign (other than an official notice) ralating to the election

Home Department considers that the above clauses of the order may be invalid, but R.L.A. is requested to advise.

2. In his opinion No. 3371 , dated the 29th February 1952, the Additional Secretary had advised that the power conferred by section 144 upon a Magistrate is an extraordinary power and before it is exercised, a reasonable connection will have to be established between the act prohibited and the apprehended danger

V.V.K. 29/6/56/

5C.

which it is feared will lead to a distrurbance of public tranquility, etc. referred to in section 144, and that the likelihood of such distrubance, etc. owing to the act prohibited must be a reasobable and proximate one and the connection between them must not be speculative or distant. Applying this principle, the order so far as it prohibited meetings and processions on the election day is perfectly valid though the same cannot be said so far as it prohibited exhibiting of notices and signs, as such exhibition does not ordinarily appear to have any reasonable connection with the apprechended danger, unless of course the signs or notices are of such a character as to inflame feelings.

Id/- P.M.L.
dt/- X/ 8/

Remembrancer of Legal Affairs.

U.R. to H. D. No. 13021,
dated the 8th August 1952.

VVK. 29/6/56/

SC.

Office of the R.L.A.

Government has already preferred an application in revision to the High Court, Bombay against the order of the Resident Magistrate, First Class, Kaira dated the 12th July 1951 whereunder the complaint in cases referred to in para 2 of the District Magistrate's letter at page 1 ante were dismissed. (Vide Government Resolution, Legal Department No. 1922 , dated the 6th February 1952). If that revision application is allowed, there would be no need to grant sanction for the prosecution and the rest of the cases can be proceeded with straightway. Moreover, if the District Local Board has now dismissed Shri Patel in pursuance of Government orders, no sanction would be necessary for his prosecution (Emp. v. P. A. Joshi 50 Bom. L. R. 160) In the circumstances, the L.S.G. & P.H.D. is requested to await the result of the Revision Ap plication filed by Government orders before considering the question of granting sancion .

Id/- P.M.L.
dt/- 19/6/

Remembrancer of Legal Affairs.

U.R. to L.S.G. & P.H.D. No. 580-Confl .
dated the 20th June 1952.

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5C.

Office of the R.L.A.

In his opinion No. 10873 dated ~~1x~~ 1st July 1952, R.L.A. has held that the Commissioner of Police is competent to dismiss an Inspector of Police. Section 197, Criminal Procedure Code, does not, therefore, apply to an Inspector and no sanction would be necessary to prosecute him.

Id/- P.M.L.
dt/- 21/8/

Remembrancer of Legal Affairs.

U.R.to H.D. No. 13705 dated the 21st August 1952.

V.V.K. 29/6/56/

5C.

Office of the P.L.A.

Order under section 144, Criminal Procedure Code - whether can be made Inside a Beggars. Home .

A copy of the order issued by the District Magistrate under section 144 of the Criminal Procedure Code is not included in the papers, and the opinion cannot, therefore , be based upon its actual wording in the matter of the place and the persons to whom it is addressed. The opinionee can be gáven only on general grounds. Sub-section (3) of section 144 of the Criminal Procedure Code provides that an order under this section may be directed to a particular individual or to the p- public generally when frequenting or visiting a particular place. The words "when frequenting or visiting a particular ~~pxi~~ place " inevitably suggest that the public must have access to the place, as otherwise the question of the Public visiting or frequenting the place would not arise ,That is substantially the view taken in two reported decisions. In Rd.- Srirammurty, A.I.R. 1931 Madras 242 , Pandalai J. observed that no order can be passed against the public without that limitation as to place, namely, that it must be one, whether publicly or prevately owned, which at the time when the prohibition operates, the public frequent or visit. They may have a right to frequent the place as in highways and places of public resort or they may be allowed or invited to visit it as at a public meeting held in private premises. But the place must be one by the open to the public as such

This was followed by the Oudh Chief Court in Babu v. Emperor (41Cr. Law Journal 228 at p. 230) where the Court held that the law intends not only that the particular place should be specified but also that it should be a place which is frequented or visited by the public , andthen proceded to quote the observations of Pandalai J. cited above. It is difficult to hold that the Beggars' Home is a public place within the meaning of these observations, for, I do not think that it is open to the public in any sense , either as a matter of ritht or as a matter of invitation. It may be possible to treat the beggars confined in the home as a section of the public with a view to reaching the conclusion that the Beggars' Home itself is a place frequented or visited by the public, since frequenting or vising has been held to include residence, but t at would be putting an undue strain on th e language of the section.

2. On the hole I would be inclined to hold that section 144(3) would not permit an order directed against the inmates of the Beggars' Home.

Id/- P.M.L.
dt/- 25/4/52/

Remembrancer of Legal Affairs.

U.R. to H.D. No. 6466 , dated the
26th April 1952.

V.V.K. 29/6/56/

5C.

Office of the R.L.A.

Reference is invited to R.L.A.'s opinion No. 6666 dated 26th April 1952. The order which is directed to the public generally no doubt includes the precincts of the Government institutions situate within the particular area. If it is intended to include in the precincts the inside of the institution, then, the order is clearly invalid , because the public have no right of access to such inside portion. If, however, by precincts is meant the region immediately surrounding the institutions or their environs only, the order will be good inasmuch as the public have a right of access to such regions or environs. But in that case the breach of the ord r cannot be made the basis of a prosecution for what happened inside, since the order would not extend to that inside portion. Howevery it is apparent from the record that the charges are made not with reference to the breach of the order as such, but with reference to acts committed by the persons concerned which would bring their conduct within the definition of an "unlawful assembly" as given in section 141 I.P.C. Therefore, the prosecution need not be affected by the legality or otherwise of the order under section 144(3) of Criminal Procedure Code. If Government, accepts the D.M.'s view that it is expedient to contunue the prosecution, there should be no legal objection to substantiate the charge.

Sd/- P.M.L.
dt/- 1/7/

Remembrancer of Legal Affairs.

U.R. to H.C. No. 10972 , dated the 2nd July 1952.

/ SC.

Office of the R.L.A.

Arrest of prisoner who overstays parole period.

The view taken by the Deputy Secretary, Home Department that the Police can arrest without warrant a prisoner who overstays his parcle or furlough period is not correct.The powers of Police Officers to arrest without warrant are limited by statute and they have no power of arrest apart from and independent of the statute law (see Gopal Naidu V. King Emperor , 46 Mad. 605). A prisoner who overstays his parole or furlough cannot be held to be an escaped prisoner(See R.L.A.'s opinion No. 314 dated 11-1-52.), and in the absence of any statutory provision empowering the police to arrest such persons without warrant it would not be competent for them to do so. A cancellation of the suspension, however, provides such statutory authority, for sub-section (3) of section 401 , Criminal Procedure Code, in terms enacts that "thereupon the person in whose favour the sentence has been suspended or remitted may, if at large, be arrested by any police officer without warrant and remanded to undergo the unexpired portion of the sentence." A cancellation of the suspension or remission is thus a condition precedent enabling the police to arrest the prisoner without warrant and the procedure of cancellation of the order cannot be dispensed with even though the period of suspension be over.

Id/- P.M.L.
dt/- 27/8/

Remembrancer of Legal Department.

U.R. to H.D. No. 14030 , dated the 28th August 1952.

-. 29/6/56

Office of the R.L.A.

Many of the charges framed in the draft charge sheet that has been submitted at pages 83-89 ante are based on scanty material and cannot be supported. The absence of sufficient material is admitted by the Inquiry Officer himself in his letters dated 22-4-52 (p. 41 of the file) and 28-8-52 (p. 81 of the file). It is desirable, therefore, not to frame all the charges proposed in the draft charge sheet, for the inquiry in respect of those charges in support of which the material is insufficient, will be fruitless and will involve an unnecessary waste of time. The charges which should be dropped on these grounds are charges Nos. 2,3,6,7,8,9, 14 and 15 of the draft charge sheet. Charge No. 2 of the draft charge sheet, for example, gives no details of the alleged convicts whose services were utilised or of the dates on which they were utilised. It is besides based on the statement of a witness whose knowledge is more or less hearsay. Charge No. 3 is vague and is based on inferences of the same witness. In fact, ~~the statement of a witness~~. In fact, the allegations of the witness are directed not against Shri Joseph, but against Subedar Bahura Jiwaji. As regards charge No. 6 , it is apparent that the mistake was committed by the clerk concerned and he has been fined by the Superintendent. Such a mistake cannot be enlarged

5C. into a charge of negligence on the part of the Superintendent. Charge No. 7 is not well founded because the Superintendent did make inquiries from the several jailors and it was after he made ~~his decision. Charge No. 8 only relates~~

inquiries that on the basis of the information gathered from those inquiries, he made his decision. Charge No. 8 only relates to neglect in submitting a list of books in accordance with a ge-neral order. The submission of the list may have been delayed for some reason or other. It does not appear that an explanation was sought for it. The charge itself does not appear to be important. Charges Nos. 9 and 15 also are based on inferences drawn and it is not possible to substantiate them on the evidence adduced in the preliminary inquiries. As regards charge No. 14 there is no allegation that the conduct was contrary to any orders or regulations or was otherwise reprehensible. Therefore, that charge also need not be pursued. In respect of the remaining charges, the accompanying draft charge sheet and statement of allegations are forwarded.

Id /- P.M.L.
dt/- 23/9/

Remembrancer of Legal Affairs.

U.R. to H.D. No. 968 / A - Confl.
dated the 24 Septr. 1952.

V.V.K. 30/6/56/

5C.

Office of the R.L.A.

The suggestion of the Home Department to approach the High Court would not be feasible. In bailable offences, it is in the discretion of the Magistrate to give bail and the High Court will not entertain any request to fetter that discretion. All that the Police can do in such cases is to bring the relevant facts to the notice of the Magistrate and request him to take proper security before releasing the accused on a bail.

2. A copy of the reply given to the District Magistrate, Kolhapur is herewith appended.

Id/- P.M.L.
dt/- 27/9/

Remembrancer of Legal Affairs.

U.R. to H.D. No. 991/ A 1-d Confl,
dated the 1st October 1952.

V.v.k. 30/6/56/

5C.

Office of the R.L.A.

The following appear to be the only special provisions concerning the legal status of women offenders :-

(a) Section 382 Criminal Procedure Code which provides that if a woman sentenced to death is found to be pregnant the High Court shall order the execution of the sentence to be postponed and may, if it thinks fit commute the sentence to transportation for life.

(b) section 393 (b) Criminal Procedure Code provides that females shall not be punishaable with whipping.

(c) section 497 Indian Penal Code provides that in the case of adultery the wife shall not be punishable as an abettor.

Attention is also invited to pare 541 of the Bombay Jail Manual Part I . Under it, it is discretionary with the authorities whether or not to send a woman offender to a Home.

Id/- P.M.L.
dt/- 1/10/

Remembrancer of Legal Affairs.

U.R. to H.D. No. 16263 / A , dated the 3rd October 1952.

V.V.K. 30/6/56/

Office of the R.L.A.

It appears that the order to hold the commital proceedings in jail was made by the Additional City Magis - trate, First Class, Ahmedabad, on 4-9-1952. The proceddings were to commence on 12-9-1952. A copy of that Order is in the further papers that have been sent. It is under stood that the case has already commenced and is being heard in the jail in accordance with that order.

2. The proceedings which are being so heard in jail are not a trial as assumed in the note of the Home Department but are an enquiry for the purpose of committal. That , however, does not make any difference, because whether it is an enquiry or a trial, the place and the maner in which it is to be held should be such as conform to the require- ments of section 362 of the Criminal Procedure Code. There is nothing in law which requires that the enquiry shall be held only in the regular Court. It is open to the Magistrate to hold the enquiry for justifiable reasons in a Jail, but if he does so, he should see that provisions of section 352 Cr. P.C. are complied with. (See King vs. Khemein A.I.R. 1940 Rangoon 72). As pointed out in that case it is desirable if an enquiry is to be held in jail, that there should be a previous order by the Magistrate to that effect so that the accused may urge any objections if they have against the holding of the enquiry in jail. It is also necessary that Bona - fide, persons desiring to attend the court in jail should be able to do so. In this case, the Magistrate has passed such an order much before the commencement of the enquiry and has stated in that order that Bona fide persons who desire to attend the court during the enquiry be permitted to do so.

3. In the circumstances, there is no legal objection to the enquiry being held by the Magistrate in the premises of the Ahmedabad Central prison.

Id/- P.M.L.
dt/- 8/10/

Remembrancer of Legal Affairs .

.k. 30/6/56/.R. to H.D. No. 16652/A. dated the 9th October 1952

Office of the R.L.A.

In Brojendra Chandra De v. K.S. Sama, 32 , Cr. L.J. 983, it has been held that "where a complaint of theft is abndoned or not further prosecuted, the best course, if only to save the criminal court from being abused, is to hand the property back to the man who had produced it. It is not proper to hand it over to the complainant in such case ". In the present case the crop which was attached was in the possession of the tendnts and in the circumstances the Sub-Divisional Magistrate's order dated 30-1-1952, directing return of the sale proceeds to them was correct. The affidavit produced by Shri Thorat was sworn later on 18-4-1952, i.e. more than two months after the order was passed. The significance of swearing an affidavit is not known . Probably it was meant to serve as an agreement between the parties to enable the Pleader to receive the money on thier behalf, and an authority to Shri Akolkar to withdraw the money on their behalf. If Shri Adolkar accepts that authority, then as the authority is signed by all the tenants who under the orders of the Court are entitled to money, there should have been no objection to the payment of the money to Shri Akolkar.The Sub-Divisional Magistrate could have taken this statement into consideration, but for reasons which are not clear from the record, he did not do so . As that order is passed by the Sub-Divisional Magistrate as a Criminal Court, Shri Thorat may if so advised seek redress in a higher court or in a regular Civil Court.

Id/- P.M.L.
dt/- 13/10/

Remembrancer of Legal Affairs.

V.V.K. 30/6/56/ U.R. to R.D. No. 16995 / A , dated the 14th October 1952.

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Shri Karnik has two suggestions to make. They are:

(1) The powers of the Presidency Magistrates in respect of non-appealable cases should be reduced and brought in line with those of the First Class Magistrates (Mofussil), and
(2) The procedure in respect of trial of non-appealable cases should be modified.

2. In respect of the Magistrates of the First Class (Mofussil) there is no appeal from a sentence of fine not exceeding Rs. 50/- only. (See section 413, Cr. Pro. Code). This limit of Rs. 50/- is raised to Rs. 200/- if the case was tried by him summarily (See section 414). In the case of Presidency Magistrates there is no appeal, if the sentence is of imprisonment for a term not execing six months or a fine not exceeding Rs .200/- (vide section 411). The necessity for a non-appealable sentence is not disputed by Shri Karnik. The whole burden of his argument is that there is no sufficient reason for giving to the Presidency Magistrate powers higher than the mofussil First Class Magistrae. There are reasonable grounds for this distinctionme made between the two types of Magistrates. In a presidency town the level of education is ordinarily higher, means of communication better, and legal talent more accessible and readily available. Besides since appeals lie to the High Court, the High Court will otherwise get flodded with petty appeals. The same distinction has been observed between theSessions Court in the Mofussil and theSessions Court for Greater Bombay. The working of the system has not, on the whole, given rise to any injustice and, in view of the considerable congestion in the courts and the all-round demand for exepeditions disposal of cases it would not be desirable to cut down the powers of the presidency Magistrates in respect of non-appealable cases .

3. In non-appealable cases the Magistrate is not required by law to record the evidence of witnesses or

frame a formal charge (vide sections 263 and 362(4)).

Shri Karnik's argument, in effect, is that this is putting the cart before the horse, because before the case is heard the Magistrate is expected to make up his mind whether or not he is going to inflict an appealable sentence. This is, no doubt, a valid argument but is is an old argument which was considered by the Select Committee in 1922. They observed :-

> "We are inclined to agree with those critics who point out that the re-draft proposed in sub-section (1) of section 362 does not get rid of the difficulty that a Magistrate has to make up his mind as to the sentence he will impose before he begins trying the case . We cannot see how this difficulty can be got rid of ".

The difficulty is not as insuperable as has been presented by Shri Karnik . Any Magistrate of experience who goes through the papers of a case before the case begins would be in a position to make up his mind whether the case is such as would justify an appealable sentence or a non-appealable sentence. He can guide himself accordingly. If he is in doubt he should follow the procedure of an appealable case. As observed by Mukerjee C.J. in Satish Chandra Mitra vs. Manmathnath Mitra (I.L.R. 48 Calcutta, 280):

> "It may be difficult for a Magistrate to determine at the intial stage whether he will or will not pass an appealable sentence. In such a case the course he has to adopt is to make a memorandum of the substance of the evidence of each witness as the examination of the witnesses proceeds. If,, on the other hand even at the intial stage he can make up his mind that in any event the sentence to be passed by him will not be appealable he need not record evidence. "

In my opnion, therefore, the difficulty is not so great as to do away with the procedure laid down in sections 263 (1) and 362(4) of the Crininal Procedure Code.

Id/- P.M.L.
dt/- 31/10/

Remembrancer of Legal Affairs.

U.R. to H.D. No. 18197 / A dated the 1st November 1952.

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In his minute dated 10-6-1952, the Chief Minister directed that no withdrawal should be made in any aase without bringing it to his notice . In pursuance of this a Circular was issued by the P. & S.D. being Circular No. 1581/34 dated the 2nd August 1952 directing thqt whenever there is a proposal to withdraw a prosecution sanctioned against any Government servant the relevant papers should be submitted to the Chief Minister before a decision is taken. A question is now raised whether these orders apply to cases actually launched or to contemplated actions also and whether they cover withdrawal of prosecutions against Govt. servants only or against other persons also.

2. Prosecutions are normally launched by the Police in the course of their duties and a Secretariat Department is not usually consulted unless the case is of importance and / or sanction of the Department is necessary before the case is instituted.further under section 494 of the Crominal Procedure Code, 1898, it is competent eto the Public Prosecutor to withdraw a prosecution and no reference to Government is necessary under the Code. The Law Officers Rules, however, lay down that before a prosecution is withdrawn, a public prosecutor in the mofussil should consult the D.M. or other officer responsible for the prosecution, and in Bombay, the Government (cf. Rules 42 and 29 of the Law Officers Rules). Under recent instructions issued under rule 14 of the Rules of Business, Government have directed that all administrateive Departments shall consult the Legal Department on the institution or withdrawal of any prosecution at the instance of any Administrative Department (vide Rule 40(c) of the Instructions). It is clear from this Rule that

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whenever an administrative Department is concerned with the prosecution, it will have to consult the R.L.A. both at the stage of institution and withdrawal and this will be so whether the accused is a Government servant or not. In all Bombay Cases, Government has to be consulted before the Public Prosecutor withdraws the prosecution and in all such cases R.L.A. will have to be consulted. In the mofussil, however, power to sanction withdrawall is left with the D.M. and unless he makes a reference to a Secretariat Department the provisions in Rule 40 of the Instructions will not be attracted.

3. The present position regarding withdrawal of prosecutions described in paragraph 2 above has been found satisfactory in ordinary cases . It would not have been the intention of the Chief Minister that every case of withdrawal of any kind of prosecution against any person should be submitted to him. Important cases where R.L.A. is consulted are of course submitted to him. Perhaps, the Chief Minister intended, as the Minister in need not be burdened with petty cases of corruption and breaches of trust.

4. However,the Chief Minister's intention may be got ascertained and a cirmular may then be issued in consultation with the R.L.A.

Id/- P.M.L.
dt/- 5/12/

Remembrancer of Legal Affairs,

U.R. to P. & S.D. No. 20549/ A dated 8th December 1952-.

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Code of Criminal Procedure, Sections 195(2)

Sanction for prosecution under section 193 I.P. Code.

In this case the alleged false statements were made before the clerk of the Court of the District Court, Himatnagar who was presumably empowered to administer oath and were tendered before the Commissioner, Northern Division in the revenue appeal pending before him and which was finally decided by Government after the abolition of the post of the Commissinoer, Northern Division. The inquiry held being under the Land Revenue Code shall be deemed to be a "Judicial procedding" within the meaning of section 193 Indian Penal Code (See Sec. 196 Bom. L. Revenue Code). Even otherwise the evidence having been given under the sanction of law would invite section 193 Indian Penal Code (14 W.R. (Cr.) 24). Therefore the proper section for taking action is section 193 Indian Penal Code. And as the Government acting as the appellate authority under Chapter XIII of the Land Revenue Code would be a Court within the meaning of section 195(2) of Criminal Procedure Code, sanction of the Government would be necessary.

Id/- P.M.L.
dt/- 13/12/

Remembrancer of Legal Affairs.

U.R. to R.D. No. 21075 / A, dated the 15th December 1952.

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The offence of criminal breach of trust which Shri Parmar is alleged to h ave committed is a cognisable offence and it is desirable e to have it investigated by by the Police before a prosecution is launched . The District Magistrate within whose jurisdiction the offence was committed may be requested to take steps in that direction.

Id/- P.M.L.
dt/- 12/12/

Remembrancer of Legal Affairs.

U.R. to E.D. No. 1384 / A- Confl. dated the 13th December 1952 .

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SC.